ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Market Entry and Regulation of	)	RM-8355
International Common Carriers	)	
With Foreign Carrier Affiliation	)	

To: The Commission

OPPOSITION TO PETITION FOR RULE MAKING

ENTEL INTERNATIONAL B.V.I. CORPORATION

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Its Attorneys

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Summary

ENTEL B.V.I. International Corporation ("ENTEL B.V.I.") opposes the Petition for Rule Making filed by American Telephone & Telegraph Company ("AT&T"). Although AT&T describes differences in the manner in which the Commission treats various international carrier applications to provide service in the United States, it fails to demonstrate that the Commission's treatment of such applicants has been flawed. Nor does it show that the mere existence of differences in regulatory approach is a situation that requires time-consuming Commission attention to all such applicants -- and additional regulation or standardization.

Specifically, AT&T never demonstrates how a non-dominant carrier can assert the sort of market leverage it claims to fear. Nor does AT&T provide any evidence that current certification requirements are inadequate to protect U.S. interests. Indeed, initiation of a rulemaking proceeding at this time is particularly unnecessary in light of the fact that the Commission only recently concluded its proceeding concerning international carrier services, in which it adopted versions of many of the proposals advanced in the AT&T Petition. AT&T has provided no reason to reexamine that decision at this early date and adopt its proposed additional reporting requirements or its burdensome and unworkable test of "comparable opportunities."

AT&T would prefer a tangle of rigid new regulations and reporting requirements that appear more suited simply to foreclosing market entry than to enhancing fair competition.

AT&T's proposed solution to the "problems" that it has alleged is overly broad, unduly burdensome, unreasonably protectionist and, ultimately, wholly unnecessary. AT&T's claim that the existing protections are insufficient is simply not supported by the evidence -- indeed, its rule making proposal is based substantially on the Commission's order in regard to Telefonica Larga Distancia de Puerto Rico ("TLD Order"), which predated the effective date of the new rules, yet was animated by the spirit of the Commission's case-by-case regulatory approach. Far from proving AT&T's contention that more detailed regulations are necessary, the TLD Order demonstrates that the Commission is fully capable of imposing additional conditions on authorizations granted to foreign-affiliated carriers, when appropriate.

Finally, AT&T's unsupported assertions that the Chilean telecommunications market is not open and competitive are without merit. In fact, foreign entry is openly encouraged in Chile, and it has quickly become the most competitive market in Latin America, indeed, among the most competitive markets in the world. Currently, three different companies provide long distance service in Chile, including ENTEL B.V.I.'s parent company. This number should soon grow to four, however, as CIDCOM Larga Distancia, a company 100%-owned by BellSouth, has applied to enter the market. These are no regulatory barriers to this application's grant, and CIDCOM is likely to begin service before mid-1994. Thus, the competitive reality in Chile is squarely at odds with AT&T's bare assertions.

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OPPOSITION TO PETITION FOR RULE MAKING

Entel International B.V.I. Corporation ("ENTEL B.V.I."), by its attorneys and pursuant to Section 1.405 of the Commission's Rules and the Commission's Public Notice, Report No. 1975, dated October 1, 1993, hereby opposes the above-referenced Petition for Rulemaking ("Petition"), filed by American Telephone and Telegraph Company ("AT&T") on September 22, 1993. For the reasons set forth herein, it is simply unnecessary for the Commission to initiate the sort of broad, time-consuming proceeding that AT&T has proposed.

I. INTRODUCTION

ENTEL B.V.I. has an interest in this matter as the majority stockholder in AmericaTel Acquisition Corporation, a U.S. company incorporated in the State of Florida, which is the proposed assignee of a Section 214 Authorization initially issued to AmericaTel Corporation. See Application of AmericaTel

Corporation for Authority to Transfer Control and to Assign Section 214 Authorizations, File No. ITC-93-160-TC, filed April 16, 1993 ("AmericaTel Application"). AT&T criticizes the AmericaTel Application in its Petition, and has also filed a "Petition to Deny" in the pending transfer/assignment proceeding. See AT&T Petition to Deny, File No. ITC-93-160-TC, filed May 28, 1993. In its Petition for Rulemaking, AT&T, inter alia, reiterates erroneous claims it made in response to the AmericaTel Application concerning the availability of competitive opportunities in the Chilean telecommunications market.

Although AT&T describes differences in the manner in which the Commission treats various international carrier applications to provide service in the U.S., it has failed entirely to demonstrate that the Commission treatment of any such applicants has been flawed, or that the mere existence of differences is a situation that requires time-consuming Commission attention to all such applicants -- and additional regulation or standardization. Initiation of a rulemaking proceeding at this time is particularly unnecessary in light of the fact that the Commission has only recently concluded a rulemaking proceeding in which it actually adopted version of many of the proposals advanced in the AT&T Petition. See Regulation of International Common Carrier Services, 7 FCC Rcd

7331 (1992) ("International Services Order"). At that time, however, the Commission declined to adopt a rigid regulatory scheme to deal with difficult market entry questions. Indeed, the Commission observed in that proceeding that an important impetus for the rules then adopted was an existing dominant carrier policy that was "overbroad, unnecessarily burdensome, and [potentially] detrimental to competition." Id. at 7332.

Only a year ago, AT&T opposed in their entirety the reforms implemented by the Commission in the International Services Order. Id. at 7332, 7333 & 7335. In its Petition, AT&T now maintains that the Commission lacks the capability to deal with foreign carrier entry and dominant carrier regulation on a case-by-case basis, as the Commission then indicated it would do. Id. at 7332-33. Rather than having the Commission evaluate applications based on information solicited through the recently modified process under Part 63 of the Commission's Rules, AT&T would prefer a tangle of rigid new regulations and reporting requirements that appear more suited simply to foreclosing market entry than to enhancing fair competition. See AT&T Petition at 5-8.

In short, AT&T's proposed solution to the "problems" that it has alleged is -- much like the out-dated dominant carrier rules revised by the Commission just last year -- overly

broad, unduly burdensome, unreasonably protectionist and, ultimately, wholly unnecessary. It is the antithesis of the measured approach followed by the Commission in its International Services Order. Even if many of the issues raised by AT&T had not been recently considered by the Commission, and more significantly, even if AT&T had convincingly demonstrated the underlying premise of its Petition -- i.e., that differences in regulatory treatment among various types of international carrier applications impair the Commission's ability to evaluate competitive entry aspects of complex transactions involving foreign affiliated carriers -- the purported cure for this malady is worse than the imagined ills of the current approach.

II. CURRENT COMMISSION REGULATIONS AND POLICIES ARE WELL-SUITED TO MAKING CRITICAL DETERMINATIONS CONCERNING THE AVAILABILITY OF COMPETITIVE ENTRY IN FOREIGN TELECOMMUNICATIONS MARKETS.

AT&T's Petition contains two sets of proposals for augmenting the Commission's current Part 63 regulations. First, it asserts that the Commission should establish an elaborate set of conditions upon all authorizations granted to foreign affiliated carriers. See AT&T Petition at 5-6. Second, it advances the idea that such carriers should be permitted entry to the U.S. market only after demonstrating that "comparable opportunities" exist in their home markets for U.S. carrier

entry, where "comparable opportunities" are defined by a laundry list of requirements set forth by AT&T. See AT&T Petition at 7-8. Neither proposal should be adopted.

A. Commission Rules Have Recently Been Changed To Better Define Requirements For International Carrier Applicants, While Allowing A Flexible Approach For Evaluating Competition In Foreign Markets.

One of the chief deficiencies in AT&T's Petition is the fact that it fails adequately to take account of the recent changes in the Commission's Rules with respect to consideration of applications for international services. See International Services Order, 7 FCC Rcd at 7331. AT&T discounts the fact that the new Part 63 Rules adopted in the International Services Order encompass significant portions of its proposal, but in a more broadly defined, and more workable form. Specifically, the current rules contemplate the gathering of information necessary to evaluate foreign carrier market control, and require applicants that have such relationships to certify that no "special concessions" have been accepted or will be accepted "with respect to traffic or revenue flows between the U.S. and any foreign country." Id. at 7335. See also 47 C.F.R. §§ 63.01(r), 63.10.

AT&T's proposals simply recapitulate these requirements in a more awkward, confrontational, and burdensome manner.[1/] In fact, AT&T states that the conditions precedent to authorization that it would impose on foreign affiliated international carriers are derived from the Commission's decision in Telefonica Larga Distancia de Puerto Rico, 8 FCC Rcd 106 (1992) ("TLD Order"). See AT&T Petition at 19. It ignores the fact, however, that the *TLD Order* was issued prior to the effective date of the rules changes adopted by the Commission in the *International Services Order*, so that TLD had not made in its application the disclosures and certifications now required by the Commission's rules. For this reason, it was necessary for the Commission to impose requirements consistent with its then announced, but not yet effective, International Services Order policy.[2/]

The conditions that AT&T seeks to impose on all foreign-affiliated carriers via new rules are based on the interim situation affecting TLD, and are merely redundant of the

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1/ For example, AT&T's proposals gratuitously attempt to place restrictions on the bargaining ability of affiliated carriers, rather than maintaining the current regulatory restrictions, which focus simply on prohibiting collusive relationshps. See AT&T Petition at 5-6 and Proposed Rule xx.01(2)(6).

2/ Cf. AT&T Petition at 30 (where AT&T inaccurately implies that the additional conditions imposed in the TLD Order are indicative of the inadequacy of the current rules).

rules codified by the Commission in its International Services Order. See 47 C.F.R. §§ 63.01, et seq. Contrary to AT&T's assertions, to the extent that individual authorizations issued under the current Part 63 rules may require some conditions on foreign entry, the TLD Order amply demonstrates that the Commission is fully capable of addressing such issues as they arise, on a case-by-case basis. The ultimate irony lies in the fact that in its Proposed Rule xx.01(h), AT&T provides the Commission with the very flexibility its Petition decries -- i.e., the ability to impose "such other conditions as the Commission may deem appropriate in the circumstances." AT&T Petition at Proposed Rule xx.01(h).

B. AT&T Fails To Make A Credible Showing that the Commission's Current Approach Requires Revisiting and Alteration At This Early Date.

1. AT&T Makes No Showing That Case-By-Case Evaluation Under Current Commission Standards And Rules Offers Insufficient Protection To U.S. Carriers.

AT&T's Petition is based in substantial part on the unproven notion that current differences in regulatory treatment among Section 214 facilities-based authorizations, submarine cable landing licenses, and international resale authorizations are clouding market entry issues. See AT&T Petition at 13 et

seq. It fails, however, to provide any showing demonstrating the validity of this assertion.

For example, AT&T maintains that the current process is "insufficient because it depends on the applicant seeking Commission approval," which approval is not necessary for expansion by non-dominant carriers. AT&T Petition at 31. AT&T, however, never provides evidence to support its contention that the current process is insufficient (assuming, of course, that it is even referring to the "process" contemplated under the rules adopted in the International Services Order). Specifically, AT&T never demonstrates how a non-dominant carrier, i.e., one without a "control" relationship with a foreign carrier, can successfully use leverage against a U.S. carrier. Similarly, AT&T provides no evidence that the certification requirement is insufficient, relying merely on bald hearsay and conjecture (e.g., that AT&T "has been informed of exclusive arrangements between MCI and foreign carriers" in Canada). AT&T Petition at 31 n.38. Moreover, it does not explain how its proposals would improve the ability of the Commission to police such arrangements that might exist.

The fact remains that any foreign-affiliated carrier must certify to the Commission that it has not and will not accept special concessions from its affiliate, and that any such

carrier whose affiliate has bottleneck control in its home market will be subject to dominant carrier regulation. 47 C.F.R. § 63.01(r)(3). Finally, in the event that a non-dominant carrier does accept special concessions, the Commission will have the ability to impose dominant carrier regulation on the offending company or, in more egregious cases, revoke its authorization. See International Services Order, 7 FCC Rcd at 7335.

2. AT&T's Petition Itself Demonstrates The Soundness of The Commission's Current Approach.

Not only does AT&T fail to make its case that additional market entry regulations are warranted, but its conclusions regarding Commission consideration of foreign international carrier applications are repeatedly undermined by its own statements. For example, although AT&T states that the current ad hoc approach "has offered little guidance for new situations" (see AT&T Petition at 4), it later admits, as noted above, that its own rulemaking proposal is modeled on conditions imposed by the Commission in the TLD Order. See AT&T Petition at 19 n.19. This is a clear indication that the Commission's current processes are sufficient to deal with any disparities that may exist or arise in foreign market entry.

Moreover, AT&T's contention that the Commission's rules are being "outpaced by events" is yet another strong argument

against pursuing the sort of broad-in-scope, detailed-in-application rule making that AT&T proposes. See AT&T Petition at 31. If events are unfolding as rapidly as AT&T suggests, it would be inappropriate for the Commission to yield its flexibility to request information from applicants on an as-needed basis, and instead attempt to devise an anticipatory scheme that encompasses in minute detail all situations that may develop and requires that all information that is potentially pertinent to each situation be filed initially. The current approach is further supported by AT&T's admission, buried in a footnote near the end of its lengthy Petition, that the rules it proposes "ultimately will become unnecessary following the opening of foreign markets and the development of effective competition." AT&T Petition at 42 n.55.[3/] That being the case, the Commission's existing procedures are ideally adapted to providing the necessary controls until such time as AT&T's prescient prophecy comes to pass. Clearly, the Commission need not expend its scarce resources on what would be only interim rules whose burdensomeness upon all applicants would vastly outweigh any utility they might provide.

3/ As demonstrated in Section III, Chile has already reached the level of market openness and competition in long distance services that makes AT&T's proposals unnecessary.

C. Certain Aspects of AT&T's Proposal Are Excessively Regulatory Or Completely At Odds With Current, Soundly Based Commission Policies.

1. AT&T Attempts to Extend Common Carrier Regulation to Enhanced Services.

In its initial proposal for conditioning foreign carrier entry or expansion in the U.S. market, AT&T proposes a sweeping change in common carrier regulation by suggesting that enhanced services be included within the scope of the Commission's international common carrier regulation under Title II of the Communications Act of 1934. See AT&T Petition at 5 and Attachment I, Proposed Rule xx.01(1)(a). Since 1980, however, the Commission has consistently viewed all enhanced services, domestic and international, as not subject to common carrier regulation. See Second Computer Inquiry, 84 F.C.C.2d 50, 53 n.4 (1980). See also Computer III Remand Proceedings (CC Docket No. 90-623), 6 FCC Rcd 7571, 7580 (1991).

The treatment of international enhanced services as outside the scope of Title II has been challenged or questioned on several occasions, and in each instance, the FCC has not only affirmed this policy but has done so forcefully and unequivocally. See, e.g., GTE Telenet Communications Corp.--Tymnet, Inc., 91 F.C.C.2d 232 (1982), aff'd on recon.,

100 F.C.C.2d 776 (1985) ("GTE Telenet Recon. Order"). In the GTE Telenet Recon. Order, for example, the FCC stated unambiguously:

> [In the Second Computer Inquiry], [w]e made a generic determination that all enhanced services are outside the scope of our Title II jurisdiction. Having made this jurisdictional determination, the question of according separate regulatory treatment under Title II to a separate class of enhanced services, i.e. those provided internationally, is moot.

GTE Telenet Recon. Order, 100 F.C.C.2d at 793.[4/] Most recently, in the International Services Order itself, the Commission stated that its inquiry into market power in foreign countries would be limited to:

> those entities that provide services and facilities in the destination market that are of the type the Commission regulates as common carriage. Thus, we exclude from our dominant carrier regulations U.S. international carriers affiliated with foreign entities that, for example, provide . . . enhanced (or value added) services . . .

International Services Order, 7 FCC Rcd at 7334.

4/ This determination also was explicitly affirmed in the course of the FCC's Third Computer Inquiry, 104 F.C.C.2d 958, 1128-30 (1986), aff'd on recon., 2 FCC Rcd 3072, 3106-3109 (1987), vacated sub nom. California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (the court overturned the FCC's decision in the Third Computer Inquiry removing structural separation requirements between enhanced and basic services, which had been applicable to some common carriers as a result of the Second Computer Inquiry; but the court left untouched policy determinations adopted in the Second Computer Inquiry that were merely affirmed by the FCC in the Third Computer Inquiry, including the decisions regarding the regulatory status of enhanced services.)

Despite these clear statements of Commission policy with respect to the regulation of international enhanced services, AT&T simply lumps enhanced and basic services together in its rulemaking proposal, absent any explanation of the purpose to be served in making such a fundamental change. Its back-door attempt to ensnare international non-common carrier services within its proposed regulatory dragnet should not be accorded serious consideration by the Commission.

2. AT&T Proposes A Definition of Foreign "Affiliate" That Is Unreasonably Expansive.

Similarly, AT&T proposes, absent any supporting evidence at all, that foreign "affiliate" be defined henceforth as an entity in which a foreign carrier holds, directly or indirectly, as little as a five-percent ownership interest. See AT&T Petition at 7 n.2 and Proposed Rule xx.02(1). Such a standard would be an abrupt and wholly unwarranted reversal of Commission policy.

Specifically, the Commission concluded only last year, in the International Services Order, that the appropriate standard for determining affiliation is control. See International Services Order, 7 FCC Rcd at 7332. Then, the Commission stated its determination that "[a]bsent control

. . . [a] foreign carrier would not be in a position to direct the actions of [its affiliated] U.S. carrier," and its belief that a "U.S. carrier would be unlikely to risk sanctions by this Commission for participating in discriminatory conduct that violated Commission rules or policy, or any conditions of its Section 214 certificate." Id. Despite this recent straightforward statement of the Commission's thinking, AT&T has simply stated its belief that companies should be considered affiliated based not on control but on 5% ownership, because "greater levels of investment suggest more than passive arrangement and create incentives for discrimination." AT&T Petition at 7 n.2.[5/]

Moreover, AT&T fails to address the patent inconsistency between its 5% affiliation threshold and the Commission's prior, more-stringent standard for evaluating the interest of foreign entities in U.S. international carriers. Particularly, in 1985 the Commission concluded that it would consider 15% foreign ownership the appropriate level of equity to

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5/ As explained in Section III below, AT&T's theory is not supported in the Chilean telecommunications market, where ENTEL-Chile, ENTEL B.V.I.'s parent company, has seen a dramatic reduction in market share despite the fact that Telefonica de España, which owns 20% of ENTEL Chile, also owns 49% of CTC, the Chilean interexchange carrier which controls most routing for international long distance traffic.

invoke dominant carrier regulation. See International Competitive Carrier Policies, 102 F.C.C.2d 812, 842 n.74 (1985). Although the regulatory treatment of international carriers has been successfully liberalized and streamlined since that time, AT&T proposes its much more narrow standard without any explanation as to why the Commission should now be concerned about 5% foreign ownership in a U.S. carrier when this is but one-third the level that attracted its attention nearly a decade ago. Indeed, the Commission noted even then that "some large investments may be passive and in those instances, or for other good public policy reasons, waivers may be granted." Id.

In the face of the Commission's still quite recent conclusion that actual control, positive or negative, is the relevant determinant of affiliation, AT&T has simply offered nothing that would demonstrate a need to adopt any standard more stringent than the one adopted last fall. This is especially true given the fact that AT&T participated in that proceeding and the Commission explicitly rejected the arguments that it advanced "in light of the substantial competitive benefits that can result from lifting the burden of current regulation." International Services Order, 7 FCC Rcd at 7333. These benefits led to the Commission's sound adoption of "control" as the determinant of

affiliation -- AT&T has provided no basis for revisiting this issue now.

To compound the fallacies of AT&T's blunderbuss approach to its perceived difficulties with foreign carriers, AT&T's proposed rigid re-regulation of "foreign carriers and their affiliates," would apparently apply across-the-board, and not just on those routes where the foreign carrier has market power that it is abusing to the detriment of unaffiliated U.S. carriers. The Commission's current approach to this matter -- an approach reflected in the International Services Order and Sections 63.01(r) and 63.10 -- is logical, narrowly-tailored to redress actual instances of abuse, and not unduly burdensome. AT&T would, on a whim, have the Commission walk away from its new approach. The Commission should reject AT&T's xenophobically-inspired proposal.

3. AT&T's Attempt To Undermine The Sovereignty Of Foreign Countries By Coercing Them To Adopt Regulatory Provisions Similar To U.S. Regulations, Must be Emphatically Rejected.

AT&T's Petition also includes a lengthy attempt to define the amorphous concept of "comparable competitive opportunities." See AT&T Petition at 7-8 and Proposed Rule xx.02(2). Unfortunately, AT&T's definition simply attempts to apply U.S. regulatory concepts to foreign markets -- essentially

mandating adoption of U.S. standards abroad before foreign telecommunications providers will be permitted to enter the U.S. market.[6/]

The U.S. should not attempt to impose U.S-market based regulatory provisions upon markets that do not resemble this country's, e.g., where telephone facilities and regulatory mechanisms are simply less advanced or have developed differently. Clearly, attempting to browbeat foreign administrations into virtually guaranteeing opportunities for U.S. telecommunications giants on familiar terms will not foster the growth of the international telecommunications marketplace. Rather than attempting to remake other markets in the U.S. image (or AT&T's version of it), the United States should merely attempt to ensure that the conditions extant in foreign markets do not harm the ability of U.S. carriers to compete. Just as foreign carriers must adapt to U.S. regulatory standards, so should U.S. companies learn to gauge the terrain abroad and adjust their business plans accordingly. The key to the success

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6/ Elsewhere, AT&T proposes intrusion into the setting of accounting rates by foreign companies by actually having the U.S. attempt to set a cost-based standard with which such companies would be required to comply, unless they granted all U.S. carriers their lowest rate charged to any other foreign carrier (absent a "justification" for foreign carrier any deviation). See AT&T Petition at Proposed Rule xx.01(2)(c).

of such a policy approach is guaranteeing opportunity -- not mandating virtual identicality.

AT&T, however, would essentially place upon affiliated foreign carriers the burden that their home countries not only provide competitive opportunities for U.S. companies, but that these opportunities be provided on a basis that enhances the ability of U.S. companies to succeed in the foreign market. Indeed, AT&T audaciously demands that foreign carriers be held accountable for the failure of U.S. carriers in foreign markets, regardless of whether that failure is attributable to the government policies in place in those markets. Never before has such a responsibility been placed at the feet of foreign carriers. To exclude carriers from the U.S. market for reasons that may well be beyond their control is grossly inequitable. AT&T's proposals are irrational and unfounded.

III. AT&T WILLFULLY DISTORTS THE AVAILABILITY OF COMPETITIVE OPPORTUNITIES IN THE CHILEAN TELECOMMUNICATIONS MARKET.

As noted above, AT&T has petitioned the Commission to deny a pending Section 214 transfer and assignment application to which ENTEL B.V.I. is a party. In that proceeding, AT&T has argued, contrary to current Commission rules and policies,[7/]

7/ AT&T's filing of the instant Petition may be viewed as an implicit admission that the AmericaTel Application is fully (continued...)

that the proposed transfer and assignment application should be rejected based on its inaccurate assertion that the long distance service market in Chile is not yet competitive. As ENTEL B.V.I. has amply demonstrated in that proceeding, however, the Chilean long distance market is not only competitive, it is the most open in Latin America, indeed one of the most open anywhere in the world. See ENTEL B.V.I. Opposition, ITC-93-160-TC, at 10-12.

In fact, as AT&T itself has been constrained to admit in pleadings before the Commission concerning the AmericaTel Application, there are now several companies providing interexchange and international telecommunications services in Chile (see AT&T Petition to Deny, File No. ITC-93-160-TC, at 3); the Chilean government has taken affirmative steps to ensure the continued development of effective competition (Id. at 3-4); and ENTEL-Chile, ENTEL B.V.I.'s parent company, "has led the Latin American region in accounting rate reform and the introduction of new U.S. carrier services on a prompt and fair basis . . ." (Id. at 4). This is clearly the type of constructive change that the U.S. is seeking to foster in foreign telecommunications markets.

Despite these facts, AT&T persists in the assertion that, while promising, the developments in Chile do not measure

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7/ (...continued)
compliant with and currently grantable under the Commission's existing rules and policies.